

FILED
MAR 27 2003
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEPUTY CLERK

§ 87(2)(b)

The issue presented before the Court is whether substantial evidence supports the Commissioner's final administrative decision that as of October 13, 1998, the date of the cessation determination, Enna Ezell was not disabled within the meaning of the Act for purposes of continued entitlement to Title XVI benefits. As discussed more fully below, this Court finds the Commissioner's decision affirming the October 13, 1998 cessation determination is supported by substantial evidence and comports with the applicable legal standards, and more particularly, with the childhood disability standard as prescribed by the legislative changes made to the law in 1996. Accordingly, plaintiff's motion for summary judgment seeking an award of benefits, or alternatively, a remand, is **DENIED** in its entirety, and the Commissioner's decision upholding the cessation determination on the basis that Enna Ezell is no longer a disabled child under the Act, is **AFFIRMED**.

II. Jurisdiction

The Court has jurisdiction under 42 U.S.C. § 405(g) and § 1383(c)(3).

III. Administrative Proceedings

Plaintiff prospectively filed an application for SSI benefits on November 30, 1993, on behalf of her minor daughter Enna Ezell, alleging disability since January 30, 1990, due to seizures, allergies, and sinus problems.³ On February 4, 1994, the SSA determined that Enna Ezell was disabled because her condition met the severity criteria of Listing 111.02A of the Listing of Impairments.⁴ The SSA also determined that Enna Ezell's disability began on November 1,

³ Administrative Transcript ("Transcript") at 8, 159, 170.

⁴ **Id.** at 83. The Listing at issue, now categorized as Listing 11.02, is part of the Neurological category of impairments and refers to "convulsive epilepsy, (grand mal or psychomotor), documented by detailed description of a typical seizure pattern, including all associated phenomena; occurring more frequently than once a month in spite of at

1993.⁵ On October 13, 1998, plaintiff was notified her daughter's entitlement to SSI benefits would terminate at the end of December of 1998, pursuant to a continuing disability review which found considerable medical improvement of Enna Ezell's seizure disorder in that such disorder was now effectively controlled by prescribed medication.⁶

Plaintiff administratively appealed the cessation determination on November 2, 1998.⁷ The SSA, on June 29, 1999, affirmed the decision on reconsideration.⁸ Plaintiff proceeded to request a hearing before an Administrative Law Judge ("ALJ"), and a hearing was held on February 4, 2000.⁹ Plaintiff and Enna Ezell appeared at the hearing represented by a non-attorney.¹⁰ At the hearing, both plaintiff and her daughter testified at length and their non-attorney representative was also fully able to elicit testimony from them.¹¹ At the time of the hearing proceedings, Enna Ezell was 15 years old and in the ninth grade. A review of the hearing transcript indicates Enna Ezell was able to provide succinct and direct answers to the questions posed to her by the ALJ and her non-attorney representative.¹²

least 3 months of prescribed treatment." 20 C.F.R. Pt. 404, Subpt. P, App. 1. Subsection A of the Listing refers to daytime episodes with loss of consciousness and convulsive seizures. Id.

⁵ Transcript, at 8 and 83.

⁶ Id. at 83 and 112. In a child's disability claim, medical improvement means a "decrease in the medical severity of your impairment(s) which was present at the time of the most recent favorable decision that you were disabled or continued to be disabled." 20 C.F.R. § 416.994(a)(c).

⁷ Transcript at 100.

⁸ Id. at 77.

⁹ Id. at 20-69.

¹⁰ Id.

¹¹ Id.

¹² Id. at 22-48.

After reviewing the evidence and hearing testimony, the ALJ, on May 2, 2000, upheld the cessation determination and found that as of October 13, 1998, Enna Ezell was no longer a disabled child under the Act.¹³ The ALJ's determination was primarily based on the fact that Enna Ezell had experienced medical improvement and her medical impairment, *i.e.*, her seizure disorder, no longer met the severity criteria of Listing 111.02A of the Listing of Impairments.¹⁴ The ALJ also determined that as of October 13, 1998, the limitations resulting from Enna Ezell's seizure disorder did not meet, medically equal, or functionally equal any other listed impairment.¹⁵ Furthermore, the ALJ determined that as of October 13, 1998, Enna Ezell did not have a medically determinable impairment (or combination of impairments) which resulted in "marked and severe" functional limitations.¹⁶ The ALJ ultimately determined that as of October 13, 1998, plaintiff was not under a "disability" as defined in the Act.¹⁷

Following the ALJ's finding of no disability, plaintiff requested review of the ALJ's decision to the Appeals Council on May 19, 2000.¹⁸ The Appeals Council, on July 18, 2001, denied plaintiff's request for review concluding that the ALJ's decision was not erroneous and adopted it as the final decision of the Commissioner.¹⁹ This lawsuit ensued.²⁰

¹³ Id. at 8-17.

¹⁴ Id. at 16 (Finding No. 1).

¹⁵ Id. at 17 (Finding No. 2).

¹⁶ Id. (Finding No. 3).

¹⁷ Id. (Finding No. 4). The SSA's regulations provide that once a determination of medical improvement is made, the SSA must also consider whether the child is still disabled. See 20 C.F.R. § 416.994(a)(b)(3).

¹⁸ Id. at 4.

¹⁹ Id. at 2-3.

²⁰ Docket Entry 1.

IV. Issues Presented

1. Whether substantial evidence supports the Commissioner's decision affirming the October 13, 1998 cessation determination and finding that Enna Ezell is no longer a disabled child under the Act?
2. Whether the Commissioner applied the proper legal standards in evaluating the evidence?

V. Analysis

A. *Judicial Review: Substantial Evidence Standard*

In reviewing the Commissioner's decision, the Court is limited to a determination of whether substantial evidence supports the decision and whether the Commissioner applied the proper legal standards in evaluating the evidence.²¹ "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²² Substantial evidence "must do more than create a suspicion of the existence of the fact to be established, but 'no substantial evidence' will be found only where there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'"²³

If the Commissioner's findings are supported by substantial evidence, they are conclusive and must be affirmed.²⁴ In reviewing the Commissioner's findings, the Court must carefully examine the entire record, but refrain from re-weighing the evidence or substituting its judgment

²¹ Martinez v. Chater, 64 F.3d 172, 173 (5th Cir. 1995); 42 U.S.C. §§ 405(g), 1383(c)(3) (2002).

²² Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990) (quoting Hames v. Heckler, 707 F.2d 162, 164 (5th Cir. 1983)).

²³ Abshire v. Bowen, 848 F.2d 638, 640 (5th Cir. 1988) (quoting Hames, 707 F.2d at 164).

²⁴ Martinez, 64 F.3d at 173.

for that of the Commissioner.²⁵ “Conflicts in the evidence and credibility assessments are for the Commissioner and not for the courts to resolve.”²⁶

B. Statutory Framework for Determining SSI Childhood Disability and the Impact of Recent Legislation

Because the legal standards by which to analyze a child’s entitlement to SSI benefits has changed significantly over the years, and because the plaintiff questions whether the ALJ applied the correct standard, the Court finds it prudent to provide a background discussion of the applicable legal standard prior to addressing plaintiff’s specific challenges to the ALJ’s decision.

1. Background

On August 22, 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“the 1996 Act”), which amended the statutory standard for children seeking SSI benefits based on disability.²⁷ Prior to the enactment of the 1996 Act, a child was considered disabled if he or she had a medically determinable physical or mental impairment that met the statutory duration requirement and that was “of comparable severity” to an impairment that would disable an adult.²⁸ Plaintiff’s original application on behalf of her daughter, filed on November 30, 1993, and the subsequent award of SSI benefits were adjudicated under this standard.

²⁵ Ripley v. Chater, 67 F.3d 552, 555 (5th Cir. 1995); Villa, 895 F.2d at 1021 (“The court is not to reweigh the evidence, try the issues de novo, or substitute its judgment for that of the Commissioner.”).

²⁶ Martinez, 64 F.3d at 174.

²⁷ See § 211(a) of Pub. L. 104-193, 110 Stat. 2105, 2188-89 (codified at 42 U.S.C. § 1382c(a)(3)(C)). The Court adopts the Commissioner’s discussion of the background of the 1996 Act because it is an accurate discussion of the substantive changes made to the applicable law. Docket Entry 17, at 3-7.

²⁸ 42 U.S.C. § 1382c(a)(3)(A) (1994); 20 C.F.R. § 416.924 (1996).

The 1996 Act revised this standard. Under the revised standard, a child seeking SSI benefits based on disability will be found disabled if he or she has a medically determinable impairment “which results in marked and severe functional limitations,” and which meets the statutory duration requirement.²⁹

The 1996 Act also made other changes to the disability determination process for children. These changes included the elimination of the “Individualized Functional Assessment (or IFA),” used under the SSA’s prior rules,³⁰ and the deletion of references to “maladaptive behavior” from specified sections of the SSA’s Listing of Impairments contained in 20 C.F.R. Part 404, Subpart P, Appendix 1.³¹

The SSA published interim final rules on February 11, 1997, to implement the childhood disability provisions of the 1996 Act.³² The interim final rules deleted references to the former standard of “comparable severity” and made other revisions to the rules, including those related to the elimination of the IFA and the deletion of references to “maladaptive behavior” in the specified sections of the listings. Consistent with Congressional intent, the interim final rules defined the statutory standard of “marked and severe functional limitations” in terms of “listing-level severity.”³³ The interim final rules also established a new sequential evaluation process for

²⁹ 42 U.S.C. § 1382c(a)(3)(C) (1994 and Supp. II 1996).

³⁰ See 20 C.F.R. §§ 416.924d, 416.924e (1996).

³¹ See § 211(b)(1)-(2) of Pub. L. 104-193, 110 Stat. at 2189.

³² See 62 Fed. Reg. 6408. The childhood disability standard announced in the 1996 Act is more stringent than the “comparable severity” standard. See Nelson v. Apfel, 131 F.3d 1228, 1234-35 (7th Cir. 1997) (“‘Under the new law, a child’s impairment or combination of impairments must cause more serious impairment-related limitations than the old law and our [SSA’s] regulations required.’”) (quoting 62 Fed. Reg. 6408); Harris v. Apfel, 209 F.3d 413, 419 & n.36 (5th Cir. 2000).

³³ 20 C.F.R. §§ 416.902, 416.906, 416.924(a); see H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 328 (1996), reprinted in 1996 U.S.C.C.A.N. 2716; H.R. Rep. No. 651, 104th Cong., 2d Sess. 1385, reprinted in 1996 U.S.C.C.A.N. 2183, 2444.

determining disability for children. The new three-step process required a child to show: (1) she was not engaged in substantial gainful activity (*i.e.*, not working); (2) she had a “severe” impairment or combination of impairments; and (3) her impairment or combination of impairments was of listing-level severity, that is, the impairment(s) met, medically equaled, or functionally equaled the severity of an impairment in the listings.³⁴

The interim final rules provided four methods for determining functional equivalence, the primary and most frequently used method being whether a child had marked limitations in two broad areas of functioning or an extreme limitation in one of such areas.³⁵ In the instant case, the ALJ rendered his May 2, 2000 decision in accordance with the interim final rules. That is, in determining whether Enna Ezell’s seizure disorder was of “listing-level severity,” the ALJ evaluated the impact of her impairment to her functional capacity by performing an analysis of the following five broad areas of development: (1) cognitive/communicative functioning; (2) motor functioning; (3) social functioning; (4) personal functioning; and (5) concentration, persistence, or pace.³⁶ The ALJ found, based on the medical and other objective evidence of record as well as the hearing testimony, that Enna Ezell did not have an extreme limitation in any one of these broad areas of functioning nor did she have a marked limitation in any two of these areas.³⁷

Subsequent to the ALJ’s decision, on September 11, 2000, SSA published its final rules, which became effective on January 2, 2001.³⁸ The final rules revised the interim final rules,

³⁴ See 20 C.F.R. § 416.924 (2000); see also Wilson v. Apfel, 179 F.3d 1276, 1278 (11th Cir. 1999).

³⁵ See 20 C.F.R. § 416.926a(b)(2000).

³⁶ Transcript, at 14-16 (citing to 20 C.F.R. § 416.926a(C)(5)(v)).

³⁷ Id. at 14-16.

³⁸ See 65 Fed. Reg. 54, 747. On December 21, 2000, SSA published corrections to the final rules. See 65 Fed. Reg. 80,307.

incorporating a number of revisions in response to public comments, and in light of SSA's program experience using the interim final rules.³⁹ Most significantly, however, the final rules continue to define the statutory standard of "marked and severe functional limitations" in terms of "listing-level severity." The final rules continue to follow the three-step sequential evaluation, under which SSA will consider: (1) whether the child is working; (2) whether the child has a medically determinable "severe" impairment or combination of impairments; and (3) whether the child's impairment or combination of impairments meets, medically equals, or functionally equals the severity of an impairment in the listings.⁴⁰

The final rules, however, simplify the interim final rules by replacing the four methods for determining the functional equivalence with a single method.⁴¹ Under the final rules, whether a child meets the "listing-level severity" standard is dependent upon whether the child has marked limitations in two broad areas of development or functioning or extreme limitation in one of those areas.⁴² The ALJ used the final rules in the instant case.⁴³

Further, the final rules rename, and to some extent reorganize, the broad areas of functioning (called "domains" in the final rules), and incorporate features of the three methods of

³⁹ Section 215 of Public Law 104-193 required SSA to issue regulations within three months after the date of enactment of the law (hence, the February 11, 1997 interim final rules). SSA requested public comments on the interim final rules at the time of their publication. SSA summarized and responded to those comments when it published the final rules. See SSA-DI 25290.075, "*Summary of Final Rules—Changes to § 416.926a Functional Equivalence for Children—General*" and SSA-DI 25290.045, "*Summary of Final Rules—Changes to § 416.924 How We Determine Disability for Children*," both found in the SSA's official website at: <http://policy.ssa.gov>.

⁴⁰ See 20 C.F.R. § 416.924 (2001).

⁴¹ See 65 Fed. Reg. at 54, 755, 54, 782.

⁴² See 20 C.F.R. § 416.926a (2001).

⁴³ Transcript, at 14-16.

functional equivalence that were deleted from the final rules. For instance, in this case, one of the applicable former areas of functioning was entitled “Concentration, Persistence, or Pace.”⁴⁴ Under the final rules, this domain is now entitled “Attending and completing tasks” and incorporates aspects of two prior areas of functioning such as “responsiveness to stimuli,” which applied only to children from birth to the attainment of age one, and aspects of the former area, “Concentration, Persistence, or Pace,” which applied only to children from age three to eighteen. Under the domain of “Attending and completing tasks,” the SSA now considers how well a child is able to focus and maintain attention and how well a child begins, carries through, and finishes activities, including the pace at which the child performs such activities.⁴⁵ The final rules also add a new domain, “Health and physical well-being.”⁴⁶ In fact, according to the final rules, there are now six domains used to determine a child’s functional equivalence: (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for yourself; and (6) health and physical well-being.⁴⁷ Although the final rules revise in some ways the methodology for evaluating functional equivalence, the basic standard for determining functional equivalence remains unchanged in the

⁴⁴ Id.; see also 20 C.F.R. § 416.926a(c)(4)(vi)(2000).

⁴⁵ See 20 C.F.R. § 416.926a(h)(2001). The ALJ, in citing to 20 C.F.R. § 416.926a(C)(5)(v) in his decision, defined “concentration, persistence, or pace” as “one’s ability to engage in an activity and to sustain the activity for a period of time and at a reasonable pace.” Transcript, at 14-15.

⁴⁶ See 20 C.F.R. § 416.926a(1)(2001).

⁴⁷ Id. The SSA renamed the broad areas of functioning based on the frequent criticism from the public that they were “the same” as the domains in the childhood mental disorders listings because they used the same names. In that regard, the SSA stated “[a]lthough this criticism was inaccurate, it is true that the names of the domains in the interim final rules confused many people. The new domains are specifically designed for determining functional equivalence and are completely delinked from the mental disorders and other listings.” See SSA-DI 25290.075, “*Summary of Final Rules—Changes to § 416.926a Functional Equivalence for Children— General*,” found in the SSA’s official website at: <http://policy.ssa.gov>.

final rules. That is, to establish functional equivalence, a child must have a medically determinable impairment or combination of impairments that results in marked limitations in two domains or an extreme limitation in one domain.⁴⁸

Although the final rules revise the interim final rules in a number of ways, many of the revisions merely reorganize, simplify, and clarify existing provisions to eliminate redundancies and provide better explanations and more guidance to adjudicators.⁴⁹ In addition, the final rules contain a few provisions that merely codify pre-existing SSA policy.⁵⁰

2. Impact of the Effective Date of the Final Rules to this Case

Effective January 2, 2001, the final rules apply to claims pending at any stage of the administrative review process, including claims that are pending administrative review after remand from a federal court.⁵¹ Because the ALJ rendered his decision on May 2, 2000, well before the effective date of the final rules, his analysis was, as expected, in accordance with the interim final rules.⁵² As explained by the SSA in its preamble to the final rules, “[w]ith respect to claims in which we have made a final decision, and that are pending judicial review in Federal court, we expect that the court’s review of the Commissioner’s final decision would be made in accordance with the rules in effect at the time of the final decision.”⁵³

⁴⁸ See 20 C.F.R. § 416.926a(d)(2001).

⁴⁹ See 65 Fed. Reg. at 54,751-54,760.

⁵⁰ Id.

⁵¹ See 65 Fed. Reg. at 54,751.

⁵² Transcript, at 8-17.

⁵³ Id.

In the instant case, the Commissioner's final administrative decision was rendered on July 18, 2001, when the Appeals Council denied plaintiff's request for review.⁵⁴ Mindful of the effective date of the final rules, the Appeals Council noted in its decision that it "has also considered the final regulations, effective January 2, 2001, implementing the childhood disability provisions of [the 1996 Act]. The new regulations do not provide a basis for changing the [ALJ's] decision."⁵⁵ Thus, because the Commissioner's final administrative decision was not rendered in this case until after the effective date of the final rules, the Court's review of the Commissioner's decision will be made in accordance with the rules in effect at the time of the final decision, that is, in accordance with the final rules. Before analyzing whether the ALJ's decision is supported by substantial evidence and comports with the applicable legal standards, namely the provisions of the 1996 Act as implemented by the SSA's final rules, it is necessary to make some observations concerning the procedural posture of this case.

There is no question that the ALJ's May 2, 2000 decision, as noted by both parties, was rendered under the SSA's interim final rules which were in effect at the time. Ignored by both parties, however, is the fact that the Appeals Council did in fact render its decision denying review and thus adopting the ALJ's decision as the Commissioner's final administrative decision in the case pursuant to the final rules. Plaintiff's argument that this case should be remanded because it should have been evaluated under the final rules disregards the fact that according to the Appeals Council's decision, the SSA did evaluate the case under the final rules and concluded the ALJ's decision of no disability was a correct application of those rules.⁵⁶

⁵⁴ Id. at 2-3.

⁵⁵ Id. at 2.

⁵⁶ Id.

More importantly, while the final rules generally revise, reorganize, simplify and clarify the interim final rules, they do not change the underlying standard for evaluating the disability of a child. Through the implementation of both rules, the SSA interpreted the new definition of disability as provided under the 1996 Act: “[a]n individual under the age of 18 shall be considered disabled ... if that individual has a medically determinable physical or mental impairment, which results in *marked and severe functional limitations*, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁵⁷ Under the final rules, as under the interim final rules, a child will be found disabled only if he or she has an impairment or combination of impairments that meets, medically equals, or functionally equals the severity of an impairment in the Listings. To establish functional equivalence, the final rules require, as did the interim final rules, marked limitations in two areas of functioning (or domains) or an extreme limitation in one area of functioning (or domain). Thus, a child properly found “not disabled” under the interim final rules would similarly (as it happened in this case) be found “not disabled” under the final rules. Accordingly, for these reasons, plaintiff’s request that this case be remanded to the Commissioner so that it can be evaluated under the final rules is denied as the Commissioner, through the Appeals Council, did in fact consider the final rules before upholding the ALJ’s May 2, 2000 decision and adopting it as its final administrative decision in the case.

⁵⁷ See § 211(a)(1)-(4); 42 U.S.C. § 1382c(a)(3)(C)(i).

B. Is the May 2, 2000 ALJ's Decision Supported by Substantial Evidence?

As noted earlier in this Order, the Court will apply the SSA's final rules in reviewing the ALJ's decision. These rules define the statutory standard of "marked and severe functional limitations" in terms of "listing-level severity" — as did the interim rules. The determination of whether a child meets the "listing-level severity" standard is decided by evaluating whether the child has marked limitations in two broad areas of development or functioning or extreme limitation in one of those areas.⁵⁸ The final rules also continue to follow the three-step sequential evaluation, under which SSA will consider: (1) whether the child is working; (2) whether the child has a medically determinable "severe" impairment or combination of impairments; and (3) whether the child's impairment or combination of impairments meets, medically equals, or functionally equals the severity of an impairment in the listings.⁵⁹

Plaintiff challenges the ALJ's finding that Enna Ezell does not have an impairment that is functionally equivalent to an Appendix One Listing, a finding made at step three of the sequential evaluation process.⁶⁰ Specifically, plaintiff takes issue with the ALJ's finding that Enna Ezell has less than marked limitations in the areas of cognitive/communicative functioning and less than marked limitations in concentration, persistence, or pace. Pursuant to the final rules, and as acknowledged by plaintiff in her summary judgment brief, each of these two areas of functioning are now part of the "acquiring and using information" domain and of the "attending and

⁵⁸ See 20 C.F.R. § 416.926a (2001).

⁵⁹ See 20 C.F.R. § 416.924 (2001 & Supp. 2003).

⁶⁰ Docket Entry 11, at 9-12.

completing tasks” domain, respectively.⁶¹ Contrary to plaintiff’s arguments, however, the Court finds the ALJ’s analysis concerning these two areas of functioning or domains is indeed well-supported by the evidence of record.

1. “Acquiring and Using Information”

According to the final rules, the “acquiring and using information” domain requires consideration of how well the child acquires or learns information, and how well the child uses the learned information. For Enna Ezell’s age group (*i.e.*, adolescents, from age 12 to attainment of age 18), the rules provide the following guidelines:

In middle and high school, you should continue to demonstrate what you have learned in academic assignments (e.g., composition, classroom discussion, and laboratory experiments). You should also be able to use what you have learned in daily living situations without assistance (e.g., going to the store, using the library, and using public transportation). You should be able to comprehend and express both simple and complex ideas, using increasingly complex language (vocabulary and grammar) in learning and daily living situations (e.g., to obtain and convey information and ideas). You should also learn to apply these skills in practical ways that will help you enter the workplace after you finish school (e.g., carrying out instructions, preparing a job application, or being interviewed by a potential employer).⁶²

The SSA regulations further provide a non-exhaustive list of examples to further illustrate the types of limited functioning expected under this domain: (1) the child fails to demonstrate understanding of words about space, size, or time; *e.g.*, in/under, big/little, morning/night; (2) the child is unable to rhyme words or the sounds in words; (3) the child has difficulty recalling important things learned from school on the previous day; (4) the child has difficulty in solving mathematics questions or computing arithmetic answers; and (5) the child talks only in short, simple sentences and has difficulty explaining what he or she means.⁶³

⁶¹ *Id.* at 9.

⁶² 20 C.F.R. § 416.926a(g)(1) and (2)(v).

⁶³ § 416.926a(g)(3).

In the instant case, the ALJ defined the cognitive/communicative area of functioning as:

[O]ne's ability to learn, understand, and solve problems through intuition, perception, and verbal and nonverbal reasoning; the application of acquired knowledge; the ability to retain and recall information, images, events, and procedures during the process of thinking, as in formal learning situations and in daily living; and one's ability to comprehend and produce language in order to communicate in conversations and in learning situations, both spontaneously and interactively, in all communications environments and with all communication partners.⁶⁴

This definition essentially followed the SSA's definition of the "acquiring and using information" domain.

In determining that Enna Ezell demonstrated less than marked limitation⁶⁵ in the cognitive/communicative broad area of functioning, the ALJ stated:

Her verbal communication is slightly below average. Her IQ testing is average [citation to transcript omitted]. She failed the 1999 TAAS test, but performed better on earlier TAAS tests [citation to transcript omitted]. Her past report cards are fair [citation to transcript omitted], however her current report card demonstrates that last semester she failed Algebra I and Health Education plus no credit was received for Spanish II [citation to transcript omitted]. As noted by her mother, the claimant took Spanish II without taking Spanish I and without testing out (This simply makes no sense. How could the school put claimant in Spanish II without some type of assurance she would have the knowledge from Spanish I?) The claimant's mother testified that the curriculum at Madison High School is far more rigorous than at Kirby Middle School. The Algebra I course she failed is reportedly an advanced class. The claimant can type and uses a computer at her grandmother's house to play games and do her homework. This school year, her first semester average in English was an 82 and her first semester average in

⁶⁴ Transcript, at 14.

⁶⁵ According to the final rules, a "marked limitation" is defined as "more than moderate" but "less than extreme." 20 C.F.R. § 416.926a(e)(2). The SSA further provides:

We will find that you have a 'marked' limitation in a domain when your impairment(s) interferes seriously with your ability to independently initiate, sustain, or complete activities. Your day-to-day functioning may be seriously limited when your impairment(s) limits only one activity or when the interactive and cumulative effects of your impairment(s) limits several activities. Id.

Personal and Family Development was an 86 with comment [from her teacher] that her effort was commendable and her attitude was positive [citation to transcript omitted].⁶⁶

The court has reviewed the administrative record in this matter and concludes that the ALJ's quoted findings concerning Enna Ezell's cognitive abilities and communication skills are an accurate portrayal of the totality of the substantial evidence presented in the case. Plaintiff's contention that the ALJ erred by concluding that Enna Ezell is no longer in special education services is not accurate. While correctly noting that Enna Ezell had been fully mainstreamed into the regular 9th grade curriculum, he also acknowledged that special education services remained available to her as needed.⁶⁷ Besides the deficiencies in her first semester high school grades, plaintiff had no other significant problems at school. The Court finds the ALJ's consideration of the hearing testimony provided by plaintiff and Enna Ezell concerning the failing grades was not inappropriate, as it indeed established that the bases for them were due to factors (*i.e.*, advanced-level classes and a more rigorous high school program than middle school) completely unrelated to Enna Ezell's impairment.⁶⁸

2. "Attending and Completing Tasks"

Under the domain of "attending and completing tasks," the SSA considers how well a child is able to focus and maintain attention and how well a child begins, carries through, and finishes

⁶⁶ Transcript, at 14.

⁶⁷ Id. at 12, 35-37, 39-40, 216, 315, 317-22, 329 and 403. Due to her reading deficiencies, plaintiff qualified to receive special education services and she began using those services at the elementary level. Besides her reading deficiencies, considered by her school as a learning disability, plaintiff's seizure disorder was also categorized as "other health impairment," entitling her to special education services. Id. at 302-06.

⁶⁸ Id. at 41.

activities, including the pace at which the child performs such activities and the ease in which the child changes them.⁶⁹ For Enna Ezell's age group (*i.e.*, adolescents, from age 12 to attainment of age 18), the rules provide the following guidelines:

In your later years of school, you should be able to pay attention to increasingly longer presentations and discussions, maintain your concentration while reading textbooks, and independently plan and complete long-range academic projects. You should also be able to organize your materials and to plan your time in order to complete school tasks and assignments. In anticipation of entering the workplace, you should be able to maintain your attention on a task for extended periods of time, and not be unduly distracted by your peers or unduly distracting to them in a school or work setting.⁷⁰

As in the previously discussed domain, the SSA regulations provide a non-exhaustive list of examples to further illustrate the types of limited functioning expected under this domain: (1) the child is easily startled, distracted, or overreactive to sounds, sights, movements, or touch; (2) the child is slow to focus on, or fail to complete activities of interest to him or her, *e.g.*, games or art projects; (3) the child repeatedly becomes sidetracked from his or her activities or frequently interrupts others; (4) the child is easily frustrated and gives up on tasks, including ones he or she is capable of completing; and (5) the child requires extra supervision to keep himself or herself engaged in an activity.⁷¹

The ALJ, in citing to 20 C.F.R. § 416.926a(C)(5)(v) in his decision, defined “concentration, persistence, or pace” as “one’s ability to engage in an activity and to sustain the

⁶⁹ See 20 C.F.R. § 416.926a(h)(2001).

⁷⁰ § 416.926a(h)(2)(v).

⁷¹ § 416.926a(h)(3).

activity for a period of time and at a reasonable pace.”⁷² The ALJ, in finding that Enna Ezell has less than marked limitation in concentration, persistence, or pace, noted the following:

A school activity report prepared at the beginning of the 1998-99 school year indicated that the claimant was below average in exhibiting organization in accomplishing tasks and completing tasks on time. However, her teachers reported that she was able to work cooperatively with peers, paid attention in class, and had a positive attitude [citation to transcript omitted]. At the end of the first semester this school year, her teachers in Algebra I and Health and Family development commented that the claimant exhibited a positive attitude and her effort was commendable [citation to transcript omitted].⁷³

While the ALJ noted some deficiencies in Enna Ezell’s ability to complete her school tasks in an organized and timely fashion, the ALJ also gave weight to the comments made by her teachers concerning her positive attitude, her commendable effort, her attention in class and her ability to work cooperatively with her peers.⁷⁴ The Court finds, based on the totality of substantial evidence presented, the ALJ’s findings with respect to Enna Ezell’s ability to concentrate and stay on task is well-supported and should be affirmed.

Even accepting plaintiff’s argument that the ALJ erred by failing to consider the classroom modifications made by the school to assist her in keeping on task (*i.e.*, allowing an extra two days to complete assignments, and the opportunity to leave class for resource assistance, among others), such argument does not warrant reversal in this case as the disability standard requires a showing of marked limitations in at least two of the six domains. The Court agrees with the Commissioner that such a showing has not been made in this case.

⁷² Transcript, at 14-15.

⁷³ Id. at 16, 216-17.

⁷⁴ Id. at 216-17.

VI. Conclusion

Based on the foregoing, the court hereby **DISMISSES** plaintiff's complaint and **AFFIRMS** the Commissioner's decision. The ALJ's decision is supported by substantial evidence and correctly applies the relevant legal standards. Accordingly, plaintiff's motion for summary judgment seeking reversal of the Commissioner's final decision (Docket Entry 10) is **DENIED** in all respects.

It is so ORDERED.

SIGNED this 27th day of March, 2003.



FRED BIERY
UNITED STATES DISTRICT JUDGE